SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 580

MILTON K. YOUNG AND MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The foregoing petition is for certiorari under 237 (b) of the Judicial Code, 28 U. S. C. 344 (b) to reverse a State court decision, *Young* v. *Ventura County*, 102 Cal. App. Dec. 127.

A concise statement of the case with the questions presented, jurisdiction, and reasons relied upon for allowance of the writ is set out in the petition.

Petitioners, in the statement of the case herein have, as above stated, shown facts in the complaint. Petitioners emphasize here that they pleaded in the second cause of action in the complaint, their claim to the benefit and protection of the due process and equality clauses of the Fourteenth Amendment to the Constitution of the United States,

and also pleaded that the defendant county had damaged and taken their private property for public use without just compensation; that it deprived them of their property without due process of law, and that they had been denied the equal protection of the laws (R. 8).

The defendant county filed a demurrer, general and special, upon the ground that the claim of petitioners was not filed within the time limited by Act 5149, Deering's General Laws (Stats. 1931, p. 2475), (Appendix), and that the action was barred by said statute and that there was no pleading that the injury occurred within ninety days prior to the time of filing the plaintiffs' claim (R. 27).

Defendant also filed points and authorities as to the basis of their demurrer (R. 29) in which they set forth that Act 5149 was not in violation of the Fourteenth Amendment to the Constitution of the United States (R. 30), thus the legal issue was made by the respective parties to the action upon which the defendant's demurrer to the complaint was sustained without leave to amend, and a judgment entered accordingly (R. 30). The case comes before this Court after the affirmants of the judgment of the Superior Court of the District Court of Appeal (R. 32-37), the highest court, the Supreme Court of the State having denied petitioners' application for a hearing in said court.

The issue is clearly made, the petitioners claiming that their property has been taken from them without due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment, petitioners claiming that the statute is in violation of the Fourteenth Amendment in the respects mentioned, and therefore repugnant to the Constitution of the United States, and the defendant claiming that the said statute does not violate the mentioned guarantees of the Fourteenth Amendment.

The opinion of the District Court of Appeals does not disclose the fact that petitioners in their complaint pleaded

(R. 8) and throughout the proceedings raised the question of denial of due process and equality as guaranteed by the Fourteenth Amendment. The discussion of constitutional question in the opinion is restricted to Section 14 of Article I of the California Constitution, which provides that private property shall not be taken or damaged for public use without just compensation, and while the term "due process" is mentioned in the opinion, the reference implies that it is directed to the term "due process" as it is set forth in Section 13 of Article I of the State Constitution (R. 36).

The decision of the District Court of Appeal in this case is the only decision ever rendered in the State of California in which there has been presented the question of the repugnance of Act 5149 to the Fourteenth Amendment to the Constitution. No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses.

Assignment of Errors Relied Upon.

(1) The District Court of Appeal errs in not making specific mention in its decision of the Federal constitutional questions raised by the pleadings and in construing the California State Constitution only in arriving at its decision.

(2) That said Act 5149 and said decision are in derogation of the rights of the plaintiffs as guaranteed by the Constitution of the United States, and especially as guaranteed by the Fourteenth Amendment thereof. That by said decision plaintiffs are deprived of their property without due process of law and are deprived of equal protection of the law.

(3) Said decision is in error in holding that said Act 5149 confers the right of action where private property is taken for public use without compensation.

(4) Said Act 5149 as construed by said decision in reference to its ninety-day provision, is an unreasonable statute of limitations confiscatory of private property, and null and void under the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

(5) Said decision is in error in holding that a claim for damages must be filed within ninety days after it has occurred in a case where the time actually required for the restoration of an inundated and rock covered orchard extends over a period longer than ninety days (in the instant case a period of seven months and twenty-seven days) and also when the damages to the trees of an orchard, as in the instant case, do not develop and cannot be ascertained until long after the said ninety-day period—a period of nine months and twenty-six days.

(6) The decision is in error in not holding that the time for the filing of a claim under the ninety-day provision of the statute begins to run from the date that the damages are ascertainable instead of from the date of the injuries.

(7) Said decision is in error in holding that said Act 5149 applies to or comprehends injuries to privately owned real property occurring by the wrongful acts alleged in the complaint, and it is also in error in holding that the statute applies to any injuries other than those accidental in their nature to persons or to personal property by reason of the "dangerous or defective condition" of highways, bridges and other public places mentioned in the statute, and which occur on or in said public place.

(8) The court erred in holding that the word "accident" used in the statute should be construed as including the word "injury," thereby enlarging the purpose of the legislature to deal with accidents so as to include intentional acts, torts and known wrongs such as the diversion of a stream from its natural course.

(9) The District Court of Appeal erred in sustaining the validity of Act 5149, in that said Act by reason of not including flood control districts, exempts owners of property within such districts from the filing of claims for damages within ninety days and thereby denies equality to owners of property in municipalities, counties, etc., named in the Act, in that it imposes upon them the burden of filing claims.

(10) Act 5149 is void as against public policy, due process and equality before the law in that it permits the Board of Supervisors to delegate its power to compromise a claim to a third party—a specially employed attorney.

The Statute Drawn in Question.

This case, as it relates to the statute drawn in question may, we think, be regarded as *sui generis*. Section 1 of the statute in intent and purpose is similar to provisions frequently found in city charters. Otherwise, unless as progeny thereof, which our examination has failed to discover, there is not another similar general statute in the United States. It is in fact a combination statute, by which in the first section thereof the right of recovery of damages by a suit is conferred in a class of cases in which no right of action would exist unless conferred by statute. Also, in Section 1 a limited period of time is prescribed in which this conferred right of action may be exercised. Section 2 concerns the duties of the attorney for the municipality, county or school district as the case may be with reference to the defending of suits, and the section further provides for the employment of special counsel whose fees are made a lawful charge against municipalities, cities and counties, and school districts. Section 3 provides for insurance against damages arising under Section 1, and for payment of premiums to insurance companies. Section 4 is the sequel to the special attorney provision in Section 2. Section 4 is

made to provide that such specially appointed attorney shall approve the terms of any compromise of a claim by any municipalities, city and county, or school district. [Act 5149 set forth in Appendix.]

As shown by the California cases hereinafter cited, causes of action to recover compensation for private property taken for public use were enforced by common law actions for many years before the enactment of Act 5149 in 1931.

The erroneous application of this statute to the cause of action stated in the complaint is a grave injustice and raises an important Federal question not heretofore decided.

ARGUMENT.

The diversion of a county of flood waters on to plaintiffs' lands to their serious damages constituted a taking in violation of Section One of the Fourteenth Amendment to the United States Constitution.

The leading case as to unlawful taking under a Constitutional due process clause is *Pumpelly* v. *Green Bay M. Canal Co.*, 13 Wall. 166, 181, 20 L. Ed. 557, 561 reading:

> "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this county, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.
>
> "We are, therefore, of opinion that the second plea set up no valid defense, and that the demurrer to it should have been sustained" (20 Law Ed., p. 561).

The first application of the Fourteenth Amendment due process clause to a case where private property had been damaged by the diversion of a stream of water is that of *Hopkins* v. *Clemson Agricultural College,* 226 U. S. pages 636-649, 55 L. Ed., pp. 890-987.

This case is approved in *Perkins* v. *Blauth,* 163 Cal. 787, 899-0, 127 Pac. 52, 53 which held the trustees of a reclamation district liable to the land owner for injury of flooding.

United States v. *Cress,* 243 U. S. 316, 61 L. Ed. 746, holds that it constituted a taking for which compensation must be paid, where the Government constructed and maintained in aid of navigation certain locks and dams whereby the level of the rivers were raised along certain stretches rendering them, to the extent of the raising, artificial canals instead of natural waterways.

Act 5149 construed by the District Court of Appeal to bar petitioners' action to recover compensation for the damaging and taking of their private property for public use is confiscatory and deprives petitioners of their property without due process of law, as prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The heart of the statute, repugnant as petitioners believe, to the Constitution and against which petitioners mainly direct their attention, is the provision in Section 1 thereof to the effect that a claimant whose property has been injured on "any public street, highway, building, park, grounds, works or property" shall file a verified claim for damages with the proper legislative body within ninety days after the "accident" has occurred.

If it may be assumed, for the purpose of argument, at this point, that the statute has any application whatever to injuries which do not occur in or on the public places men-

tioned in the statute, the statute should be adjudged as repugnant to the due process clause of the Fourteenth Amendment as prescribing a period of time so short that it is impossible to ascertain the amount of damages in dollars to agricultural property—in this instance an orange grove, and incidental thereto it being impossible to ascertain the extent of time required and the cost of restoration of the land within the limited period of ninety days.

Paragraph VII of the complaint alleges the character of the damages to the trees of the orchard and facts to show that such damages could not be ascertained before the date the claim was filed and that even at that time the further development of impairment to the trees that would ensue could not be known (R. 6). The claim was filed December 28, 1938, nine months and twenty-six days after March 2, 1938, the date of the storm.

An examination of petitioners' claim (R. 9-27) will show the labor of restoration work began March 7, 1938, and was completed October 29, 1938 (R. 26) seven months and twenty-seven days after the date of the injuries, at a cost of $4,199.09 (R. 27). Petitioners suggest to the court that an examination of the character of the work done and the day by day progress thereof will eliminate any question concerning the possibility of filing an itemized, verified or any other kind of claim based upon facts within ninety days.

The case of *Lamb* v. *Powder River Live Stock Co.*, C. C. A. (8th Cir.) 132 Fed. 434-444, involved a statute of the State of Colorado, which provided that an action on a judgment rendered without the state which accrued more than six years prior to the commencement of the action on the judgment, must be commenced within three months after the rendition of the judgment. The decision in the case was written by Judge Vandeventer and constitutes a treatise on the question as to the constitutionality of a short statute of limitation. At p. 439 the court said:

"Perhaps no better rule as to what is a reasonable time can be laid down than that it must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate. In the words of Mr. Justice Shires in Wilson *v.* Iseminger, supra:

'A statute could not bar the existing rights of claimants without affording this opportunity. If it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.'"

Again at the same page the court said:

"To the same effect is Price *v.* Hopkins, *supra,* where it was said by Judge Cooley:

'It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; * * * and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.'

Not only is a right of action which springs from contract properly within the protection of the Fourteenth Amendment to the National Constitution, but any statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution."

Again, at p. 441 the court said:

"Thus, from whatever point the shortened limitation in the act of 1895 is considered, the question arises whether it is reasonable. No reported decision has come under our observation which sustains a like limitation."

And again at p. 442 the court said:

> "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances. A single period cannot be fixed for all cases, because what would be reasonable in one class of cases would be entirely unreasonable in another."

In considering what a reasonable period may be, within the meaning of the above decision, for the filing of claims against a county in cases of this kind, a yardstick may be found in the Code of Civil Procedure, Secs. 335-338.

> (Sec. 335) "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: (Enacted 1872) * * *"
>
> (Sec. 338) "Within three years.
>
> 1. * * *
> 2. An action for trespass upon or injury to real property."

In other words, the legislature has deemed a three-year period as being necessary to cover cases involving injuries to real property, and inasmuch as the filing of a claim under either Act 5149 or Sec. 4075 Political Code is in essence the beginning of an action, a corresponding time should be allowed for the filing of such claim, or if the emergencies of counties require a shorter period, the one-year period provided by Sec. 4075 would be more in line with Sec. 338 Code of Civil Procedure and more reasonable than the ninety-day period required by Act 5149.

Perhaps the legislature in enacting Act 5149 gave less consideration to the rights of a claimant whose property might be destroyed than to some of the other notable features of the Act.

As to the decision being in error in holding contrary to petitioners' contention that the time for filing claims under Act 5149 does not begin to run until the damages are ascertainable, we submit the following:

Crawford v. *Duncan*, 1 Cal. App. 647;
Dufell v. *State Superior Court New York Appellate Division*, 189 N. Y. Supp. p. 7593;
Reed v. *State*, 108 N. Y. 407, 414, 15 N. W. 735-738;
Middlekamp v. *Bessemer Irrigation Ditch Co.*, 46 Cal. 102, 103 Pac. pp. 280-286;
Durham v. *City of Spokane*, 68 Pac. 386;
Saunders v. *City of Boston*, 167 Mass. 595, 46 N. E. 98, Second trial 53 N. E. 822.

It constituted further violation of the due process and equal protection of the law provisions of the United States constitutional amendment to reject plaintiffs' claim and adjudge against it on the basis that it was not filed within the time provided by Act 5149, Deering's General Laws of California (Stats. 1931), p. 2475. The Act, if applicable, is itself unconstitutional as an unreasonable restriction of petitioners' constitutional rights.

A statute of limitations such as Act 5149 is not applicable to plaintiffs' constitutional right to recover just compensation for their land taken by the county by the diversion upon it of flood waters.

That statutes of limitations are not applicable to a suit to recover restitution or compensation from a county under the due process clause for property taken by it without authority we rely in part upon.

The Board of Commissioners of Jackson County, Kansas v. *United States*, (10 Cir.) 100 F. (2d) 929. That case was heard on certiorari by the Supreme Court and the decision modified only as to payment of interest but not as to the

right of recovery of the principle sum regardless of the statute of limitations of the State.

That was a suit by the government on behalf of an Indian to recover back taxes imposed upon the lands allotted to her.

The State statute provided that claims for taxes should be barred unless filed with the Board on or before a certain date. This statute was held to be merely a statute of limitations and that it did not apply to a suit by the United States in a sovereign capacity and as guardian of an Indian ward to recover back taxes wrongfully imposed on the lands of an allottee. The Court held that neither a general or specific statute of limitations is applicable to such a suit. The Court said on page 936, that in the present case

> "Recovery cannot be limited by state statute or decision when it would operate to deprive the United States and its Indian wards of the full restitution or compensation to which they are entitled under the Fifth or Fourteenth Amendments to the Constitution of the United States, U. S. C. A. Const. Amends. 5, 14. Ward *v.* Love County, *supra* page 24, 40 S. Ct. 419, and Board of Supervisors of Mercer County *v.* Cowles, 74 U. S. 118, 19 L. Ed. 86."

Ward v. *Love County,* 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751, was another case where an Indian allottee was suing to recover back taxes paid under protest. The Court said on page 759, quoting from earlier decisions:

> " 'The obligation to do justice rests upon all persons natural or artificial and if a county obtains the money or property of others without authority, the law, independent of any statute will compel restitution or compensation.' "

That the improper application of a statute of limitations in and of itself raises a Federal question of substance we

refer to *Home Insurance Company* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926. That case holds that Federal questions of substance are raised by the objection that a State statute declaring invalid any contractual limitation of the right to sue to a shorter period than two years, as applied to contracts made and to be performed outside the State violates the Federal Constitution.

This holding is applicable to the situation in our case insofar as it deals with improperly applying a certain statute of limitations.

The Court said on page 933:

> "The Texas statute as here construed and applied deprives the garnishees of property without due process of law."

The case also held it sufficient to give the Supreme Court jurisdiction over an appeal from a decision of the highest court of the State that a Federal question is properly raised where it was passed upon adversely to the claim of unconstitutionality.

This case followed in *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, holding similarly that a State may not, without violating the due process clause of the Federal Constitution, apply its own statute of limitation nullifying any contractual limitations of the time for giving notice of the claim.

Petitioners contend that the California statute as "construed and applied" by the decision of the District Court of Appeal, deprives petitioners their property without due process of law.

Act 5149 Does Not Confer the Right to Recover Compensation for Property Taken for Public Use and Cannot Restrict Such Right.

The opinion of the California District Court of Appeal states:

> "By failing to comply with the procedure established by the legislature, plaintiffs are deemed to have waived their right to enforce payment" (R. 35),

citing cases, and much more is said in the opinion to the effect that plaintiffs derive their right to sue solely from the statute.

In 12 C. J., Sec. 114 (6), p. 732, the rule as to constitutions being self-executing is as follows:

> "A constitutional prohibition against taking private property for public use without just compensation therefor is self-executing, even though the method of ascertaining such compensation is left for legislative determination. When the constitution forbids damage to private property, and points out no remedy and no statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance."

Sec. 14 of Article I, Constitution of California, prohibits such taking for public use without payment of just compensation.

The opinion holds that the right action in this case rests upon the provisions of Act 5619, Deering's General Laws (Stats. 1923), p. 675, Section 2, and the procedure thereon upon Act 5149. Your petitioners controvert the statement.

Federal cases have been prosecuted to judgment without State laws conferring the right or in aid of the procedure, as follows:

Hopkins v. *Clemson, supra;*

United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539;
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322-329.

For many years prior to the enactment of Act 5149 actions have been maintained in this State by virtue of the self-executing power of the State Constitution for the recovery of damages sustained where private property has been taken for public use, as in the case at bar. Among such cases may be noted:

Coniff v. *San Francisco*, 67 Cal. 49;
Elliott v. *Los Angeles County*, 183 Cal. 473;
Perkins v. *Blauth*, 163 Cal. 782-793.

Act 5149 did not then, and does not now, apply.

Petitioners' right of action is protected by the 14th Amendment to the Federal Constitution, and Act 5149 conferred nothing on them, and cannot take a constitutional right from them.

Act 5149 confers the right of action upon a certain class of cases which otherwise would not exist, such as accidents in and on public streets, highways, etc., mentioned in the statute. As to those cases the doctrine announced by the court is correct, but as to cases where the right is conferred and protected by either the Federal due process clause of the 14th Amendment or by Article 1, Sections 13 and 14 of the Constitution of California, Act 5149 can add nothing to the constitutional mandate. A common law action provides the remedy.

Act 5149 Was Not Designed to Apply to Cases of Taking for Public Use Without Compensation, and was Therefore Improperly Applied in Violation of Petitioners' Constitutional Rights.

No reasonable construction of the language of Act 5149 could make it apply to the facts in this case—to petitioners'

private property far removed from the public places to which the State statute was restricted.

The act complained of was a deliberate taking of property by the county and the limitations and provisions of Act 5149 do not apply, and therefore there was no requirement for a verified claim for damages to be presented in writing to the Board of Supervisors within ninety days. No accident caused the diversion, and no public street, highway, park, grounds, works or property were involved and therefore the ruling on demurrer was erroneous. The damage to plaintiffs' orchard was not caused by anything within the meaning or purview of Act 5149.

The court erred in holding that the word "accident" as used in the statute should be construed as including the word "injury", thereby enlarging the purpose of the legislature to deal with accident so as to include intentional acts, and a taking of property without compensation by diverting a stream from its natural course.

Petitioners assert that in enacting Act 5149, the legislature had in mind such accidents as usually occur to persons or personal property in the use of highways, bridges and public places.

> "Strictly speaking an accident is an occurrence to which human fault does not contribute, and the term has accordingly been variously defined as an unusual and unexpected event happening without negligence; a casualty which could not be prevented by ordinary care and diligence * * *."

Vol. I, C. J., Sec. (5) E., p. 392; *Schmidt* v. *Indiana Travelers Accident Assn.*, 85 N. E. 1032; *Briscoe* v. *Metropolitan St. Ry. Co.*, 120 S. W. 1162.

The use in the statute of the word "accident" and naming therein of the places where accidents may occur to incur liability against the corporate entity, excludes injuries

which are not accidental but result from a proximate cause—an intentional act and also those occurring on places other than those named in the statute, to-wit, injuries on and to private property. The statute is penal in its nature. It is a statute of limitation that deprives the owner of his real property for the benefit of the State and of his constitutional right to have his day in court. The legal maxim *"Expressio unius exclusio alterius"* is especially applicable as authority for the restriction of Act 5149 to its legitimate scope and field.

Act 5149 is Void as Against Public Policy as Permitting Control of a County Board's Powers to Be Exercised by a Third Person.

Act 5149, General Laws, Section 2, authorizes the employment of special counsel, Section 3 provides for insurance, and Section 4 prevents compromise without consent for special counsel.

The act is vicious in that it thus permits special counsel of the insurance company, if he should be selected as special counsel for a county, to prevent a settlement and conduct the defense of the litigations, the tendency being to prevent a fair hearing before the board of supervisors and deprive claimants of the property without compensation under the technical defense of limitations.

§ 4003 of the Political Code of California gives the county power to sue "and be sued"; that power may not be delegated or controlled by third persons.

Act 5149 and the Decision Below Deprives Petitioners of the Equal Protection of the Laws if Applied to Flood Control Districts in Some Counties and Not in Others.

Act 5149 does not mention flood control districts. The decision applies the act to a cause of action affecting land in

Ventura County. For a like cause of action concerning land in Los Angeles County where there are flood control districts [created by general law, Deering's General Laws Act 4463] the act would not apply. In other words, the owner of land in Los Angeles County would be exempt from the requirements to file a claim within ninety days. Flood control districts are not mentioned in the statute, and the owner of land in Ventura County would be required to comply with the statutes. In this manner, he would be deprived of the equal protection of the law. The owner of land in the flood control districts of Los Angeles County would, if required to file a claim at all, file the same under the General Law, section 4075 of the Political Code, and would have one year within which to perform that act.

Section 4075 of the Political Code of the State of California provides that a Board of Supervisors must not hear or supervise any claim except it be prepared with the detail provided in the statute. It allows a year after the last item of the account or claim accrued in which to file the claim. The statute also provides:

> "*Presentation of claims.* All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the boards of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein * * *." (Statute set forth in appendix, p. 33.)

Petitioners fully complied with the foregoing statute, which is not subject to the criticism that Act 5149 is when ap-

plied to this case to-wit: Act 5149 does not equally apply to the same causes of action in different localities in California. Section 4075 of the Political Code does so equally and generally apply.

Conclusion.

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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